Escambia River Electric Cooperative, Inc. *and* **William E. Patrick, Jr.** Case 15-CA-8362

December 15, 1982

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On September 3, 1982, Administrative Law Judge Howard I. Grossman issued the attached Decision in this proceeding. Thereafter, Respondent and the General Counsel filed exceptions and supporting briefs.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order, as modified herein.[2]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Escambia River Electric Cooperative, Inc., Jay, Florida, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Insert the following as paragraph 2(b) and reletter the subsequent paragraphs accordingly:

"(b) Expunge from its files any reference to the discharge of William E. Patrick, Jr., on September 22, 1981, and notify him in writing that this has been done and that evidence of this unlawful discharge will not be used as a basis for future personnel actions against him."

2. Substitute the attached notice for that of the Administrative Law Judge.

[1] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[2] The General Counsel has excepted to the Administrative Law Judge's failure to provide as part of the Order an expunction remedy in accordance with the Board's Decision in *Sterling Sugars, Inc.*, 261 NLRB 472 (1982). We find merit in this exception and modify the Order accordingly.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice. We intend to carry out its provisions as follows:

The Act gives employees the following rights:

To engage in self-organization
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To engage in activities together for the purpose of collective bargaining or other mutual aid or protection
To refrain from the exercise of any or all such activities.

WE WILL NOT do anything to interfere with these rights.

WE WILL NOT threaten employees with loss of jobs if they select Local Union No. 2152, International Brotherhood of Electrical Workers, or any other labor organization, as their collective-bargaining representative.

WE WILL NOT promise employees increased pay if they fail to select the above-named Union, or any other labor organization, as their collective-bargaining representative.

WE WILL NOT tell employees that we will not sign a contract with the above-named Union, or with any other labor organization.

WE WILL NOT interrogate our employees concerning their union activities.

WE WILL NOT discharge or otherwise discriminate against employees because of their membership in or activities on behalf of the above-named Union, or any other labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights under Section 7 of the Act.

WE WILL offer William E. Patrick, Jr., full and immediate reinstatement to his former position or, if such position no longer exists, to a substantially equivalent position, without prejudice to his seniority and other rights and privileges, discharging, if necessary, any employee hired to replace him, and WE WILL

make him whole for any loss of earnings he may have suffered because we discharged him, by paying him backpay with interest.

WE WILL expunge from our files any reference to the discharge of William E. Patrick, Jr., on September 22, 1981, and notify him in writing that this has been done and that evidence of this unlawful discharge will not be used as a basis for future personnel actions against him.

ESCAMBIA RIVER ELECTRIC COOPERATIVE, INC.

DECISION

STATEMENT OF THE CASE

HOWARD I. GROSSMAN, Administrative Law Judge: The charge was filed on October 26, 1981,[1] by William E. Patrick, Jr. (herein Patrick or the Charging Party). The complaint issued on December 1, and alleges that Escambia River Electric Cooperative, Inc. (herein Respondent or the Cooperative), threatened employees with loss of jobs if they selected Local Union No. 2152, International Brotherhood of Electrical Workers (herein the Union), as their collective-bargaining representative, promised employees less arduous work if they failed to select the Union, interrogated employees concerning their union activities and sympathies, and told employees that it would never give the Union a contract, all in violation of Section 8(a)(1) of the National Labor Relations Act (herein the Act). The complaint also alleges that Respondent discharged Patrick because of his union activities, in violation of Section 8(a)(3) and (1) of the Act.

A hearing was conducted before me on these matters in Milton, Florida, on March 24 and 25, 1982. Upon the entire record, including briefs filed by the General Counsel and Respondent, and upon my observation of the demeanor of the witnesses, I make the following:

FINDINGS OF FACT

I. JURISDICTION

Respondent is a Florida corporation with facilities located in Jay, Florida, where it engages in the transmission of electricity. During the 12-month period preceding the hearing, a representative period, Respondent derived gross revenues in excess of $250,000, and purchased and received goods valued in excess of $50,000 directly from points located outside the State of Florida. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The pleadings establish and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

[1] All dates are in 1981 unless otherwise indicated.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Respondent's Corporate Structure*

The Cooperative's bylaws specify the requirements for membership in the corporation, and provide that it shall be managed by a board of nine trustees elected by the members. Officers are elected by and from the Board after the annual meeting of the members (G.C. Exh. 6). According to President James B. Wells,[2] the board is responsible for policy and program planning, supervision and execution of programs, the letting of contracts, borrowing of money, the maintenance and development of facilities, and the control of labor relations. The board determines the salaries and benefits of employees, and their discipline, including discharge.

B. *The Representation Petitions and the Union's Certification*

The Union filed two petitions on July 7, requesting representative status in two separate units of (1) all office clerical employees, and (2) all employees excluding office clericals and other employee classifications.[3] After a hearing at which the parties disagreed as to the unit placement of certain employees, the Regional Director for Region 15 issued a Decision and Direction of Election on August 19. The election was held on September 17, and the Union was certified on September 25 as the collective-bargaining representative of Respondent's employees in the aforesaid two separate units.

C. *The Energy Conservation Program and Patrick's Employment*

Respondent was required by Federal and state law to engage in an energy conservation program, in which it furnished energy audits to its customers, together with advice on methods to reduce their energy requirements. After an energy audit of the customer's home, the results were furnished to another company which, by use of a computer, determined the home improvements which were needed. This work was done by private companies.

Respondent hired Patrick in February 1980 to implement this program, with the title of "Energy Advisor," which was later changed to "Director of Member Services." In 1981, a Federally subsidized loan program was instituted to help homeowners make the needed changes. Payment was made to the private companies doing the conservation work, pursuant to approval by the Cooperative.

Patrick did the energy audits, and forwarded the results to the independent company. The printout which the Cooperative received from this company listed the detailed energy improvements which were recommended for the house. Patrick took the printout to the customer, and answered questions if there were any. He also gave the customer a list of contractors qualified to do the

[2] At various parts of the record, Wells inadvertently refers to the board of trustees as a board of directors, and to his own position as chairman of the board.

[3] Cases 15-RC-6819 and 15-RC-6820.

work. Patrick established his own schedule, and reported to General Manager Robert Henderson.

In addition to the energy conservation program, Patrick occasionally operated the radio and telephone during bad weather, and investigated complaints about high bills. He assisted the office manager's secretary in compiling energy-saving articles for the Cooperative's magazine, made arrangements for a monthly safety program for the line crew, and helped other office personnel prepare news releases in cases of power failures. Patrick made presentations concerning energy conservation to schools and civic organizations, and helped prepare the Cooperative's annual meeting. He attended staff meetings which discussed new projects, until he attended a union meeting, after which he was no longer invited to staff meetings. Patrick was salaried and had no overtime. He had an office and used a vehicle supplied by the Cooperative in the performance of his duties. He did not have authority to discipline other employees. According to General Manager Henderson,[4] Patrick had no role in determining or implementing labor relations policy, and was not perceived by employees as having such role.[5]

D. *The Employment of Patrick's Brother by Coastal Insulation*

One of the private contractors was Coastal Insulation. In or about June or early July, Patrick asked General Manager Robert Henderson whether it would cause "any type of conflict" if Patrick's brother, Mark, took a job with Coastal Insulation, possibly involving conservation loan funds. Henderson told Patrick that he saw no problem, and testified that there was no problem in this arrangement up to the time of Patrick's later discharge. Henderson's secretary, Peggy Clement, testified that she heard the conversation and that Henderson replied that it would be "an asset" to have Patrick's brother doing the work, since he was a "local boy."[6]

E. *Patrick's Union Activity and Respondent's Reaction*

Patrick attended a union meeting on or about July 1[7] at another employee's home, signed a union card, and helped another employee sign a card. Buddy Burkhead, a member of the Cooperative's board of trustees,[8] testified that another trustee, J. C. Diamond,[9] told him a few days after the meeting that Patrick had attended it. The board's president, James B. Wells,[10] also testified that he had been told of Patrick's attendance.

One or two weeks later, according to Patrick's credible and uncontradicted testimony, he was visiting Henderson at his home on business. The general manager asked him whether he had attended a union meeting. Patrick replied in the negative, and Henderson said that "everybody would have their judgment day." A short time later, in Patrick's office, Henderson again asked Patrick whether he had attended a union meeting, and Patrick again denied it. The general manager asked Patrick whether he would tell other employees not to get involved with the Union. Patrick replied that he would "rather not get involved with it."[11]

F. *Hayes' Mid-summer Investigation of the "Conflict of Interest"*

Trustee Ralph Hayes[12] testified that he was a member of a loan review committee designated by the board to pass on loan applications for home insulation. In or about June or July, he noticed on an application that Patrick had done the energy audit, and that his brother was going to do the work. Hayes said that he became "concerned" about this. He brought it to the attention of other trustees at a meeting of the loan review committee in June or July, saying that it "just doesn't look good," according to trustee Preston Solomon.[13] Solomon said he "would not be a party to it," and left the loan committee.

Hayes directed General Manager Henderson to make an investigation, but Henderson did not do so. Hayes then conducted his own investigation, and talked to 10 or 12 loan applicants. He initiated an audit of his own home for the express purpose of seeing whether Patrick would recommend the company for which his brother worked. However, Patrick merely gave him a list of contractors and the work that had to be done. Hayes said he was satisfied that there was nothing improper. He also testified that Coastal Insulation had done "just about all the business" of insulation prior to the time it hired Patrick's brother, and that there was no change in its volume of business thereafter. This was confirmed by Respondent's office manager, Richard Meadows. Although no loan was approved by the board prior to June, the paperwork was started before that time, and there was no change in the ratio of contracts obtained by Coastal Insulation, approximately 85 percent.

On the day of the loan committee meeting when Hayes first brought the matter to the committee's attention, Solomon told trustees Burkhead and Narvie Lee Golden[14] that "the Patrick boys had something good going." Solomon made similar statements to Board President Wells and trustee James R. Lee.[15] However, the

[4] The pleadings establish and I find that Henderson was a supervisor and an agent of Respondent within the meaning of the Act.

[5] In the Regional Director's Decision and Direction of Election, he concluded that Patrick was not a managerial employee because he did not exercise the requisite discretion, but excluded him from the proposed unit on the ground that he did not have a community of interest with the other employees.

[6] On cross-examination, Respondent established that Patrick is Clement's son-in-law. However, since Henderson himself corroborated Patrick's testimony, and Clement's demeanor was that of an honest witness, I credit her testimony.

[7] Patrick originally testified that the union meeting took place on September 1, but corrected this on cross-examination.

[8] The complaint alleges and the answer denies that Burkhead and the other trustees were supervisors and agents of Respondent within the meaning of the Act.

[9] *Ibid.*

[10] *Ibid.*

[11] Henderson's statements to Patrick are not alleged as violations in the complaint.

[12] *Supra*, fn. 8.

[13] *Ibid.*

[14] *Ibid.*

[15] *Ibid.*

matter was not brought up at a board meeting, according to the minutes of its meetings on June 24 and July 1, which concerned loan applications. Wells told Solomon that he would "check it out." However, when Solomon next met Wells, the latter did not offer any further information on the matter, and Solomon did not ask.

G. *Respondent's Reaction to the Union Movement*

1. Trustee John C. Diamond

Employee Benny E. Youngblood testified that he had a conversation with trustee John C. Diamond at 4 or 4:30 p.m. on "Saturday, July 25," in the "B. L. Diamond Grocery Store in Brownsdale." He remembered this date because he went on vacation the following week. Diamond asked him which of his brothers-in-law worked for the Cooperative. Youngblood replied that it was "Gary." Diamond then told Youngblood that his brother-in-law might lose his job if the Union were "voted in." Youngblood replied that he did not see why, and Diamond responded: "Well, if the Union is voted in, to meet your demands we'll have to lay off the right-of-way crew." According to Youngblood, his brother-in-law works on the right-of-way crew.

Diamond acknowledges that he had a conversation about the Union with Youngblood at the grocery store in Brownsdale. However, he stated that it took place about 2 weeks before the election in the middle of September; i.e., about September 1. The trustee told Youngblood that he was concerned with the Cooperative's financial standing, and he hoped that "they" would not do anything that would get the directors in a "financial bind" to the extent that they would have "to cut certain things out." Diamond agreed that he told Youngblood that perhaps the Cooperative could "do without" the right-of-way crew, and implied that he may have discussed Youngblood's brother-in-law.

I credit Youngblood's testimony, since Diamond's is so similar as to amount to corroboration. Youngblood's memory of the date of the conversation is clearly superior to Diamond's.

2. The trustees' speeches to employees

Board President Wells testified that the trustees were "disappointed" that the employees "wouldn't talk" to them, and, instead, were considering "a third party" to represent them. On several occasions prior to the election, the trustees spoke to groups of employees. Wells testified that he had a prepared letter to read to them, but that he did not adhere to the text of the letter. Other trustees answered questions asked by the employees. The last such meeting was on September 16, the day before the election. Wells said that he did this "as chairman of the Board," and that other trustees were "probably speaking for the Board."

3. The right-of-way Crew Assistant Manager Doggett and Board President Wells

a. *Summary of the evidence*

Employee David Green, a tree trimmer on the right-of-way crew, testified that he received a telephone call a week or two before the election from Assistant Manager R. G. Doggett.[16] The latter said that a "motion" had been made to move the right-of-way crew "up to the line crew," but that, if the Union came in, the crew "wouldn't be moved up," that it would stay where it "was at." Green testified that the change indicated by Doggett would mean a pay raise for the right-of-way crew.

Doggett acknowledges a telephone conversation with Green in which he told him that Henderson was trying to help some of the members of the right-of-way crew by getting them "out" of the crew. Three members of the crew would be made groundmen, and three would become apprentice linemen. Doggett denied that he mentioned the Union during this conversation, but agreed that he did so in another conversation with Green. The latter came to Doggett with a request for a transfer out of the right-of-way crew. Doggett replied that there was nothing he could do for Green "on account of the union." Doggett asserted that this second conversation took place prior to the election. On the other hand, he also said that it took place "after the Union came in."

Green testified that Board President Wells called Green into his office on September 16, the day before the election. Wells told him that the right-of-way crew would "go out the gate" if the Union came in, but would be "moved up" if the Union lost. Green denied that Wells said anything about why this would take place. Wells handed Green a piece of paper marked "Minutes from a Board Meeting," and told Green to read the underlined portion. This referred to a motion made by General Manager Henderson to move the right-of-way crew up to line crew. According to Green, Wells also said that he would know how Green voted in the election. Green replied that he did not understand this, because it was a secret election.

Employee Louise Hall, a secretary, also testified to a conversation with Wells on the day before the election. According to Hall, Wells told her that some jobs would be lost if the Union won the election—one job "up front," one "in the back," and possibly the right-of-way crew. He considered her to be a "deciding factor in the election." On cross-examination, Hall testified that Wells said it "had to do with the financial situation."

Wells agreed that he had conversations with Green and Hall on the day before the election. They both took place in Henderson's office, although only Wells and one employee were present. Wells had just made a speech to a group of employees. However, he told Green that he was speaking to him as "a friend," not as a "Director." He said that Henderson had recorded a motion to move the right-of-way crew up to groundmen or apprentice linemen. Green was a "good employee" and the crew were "good employees," and should be "moved up." However, if the Cooperative "went union" and was put "in an economic condition to where we could not con-

[16] The pleadings establish and I find that Doggett was a supervisor and an agent of Respondent within the meaning of the Act. I conclude that the "R.G. Daugett" listed in the complaint is the same person as the witness, R. G. Doggett.

tinue work," it might have to "negotiate out the right-of-way crew, and [Wells] did not want that."

Wells asserted that he also told Hall, in his conversation with her, that he was talking with her on an "individual basis," and "wasn't representing the Board." He said that he was "concerned for the Cooperative," and that there were "a lot of activities going on that [he] didn't like." "I emphasized that I was not threatening her [and] I was not promising her anything," Wells testified. However, if the "Union went in," and put the Cooperative in an economic condition where it could not continue to operate, it might have "to negotiate out the right-of-way crew."

According to Wells, he also discussed with Hall the status of another employee who had "almost put his job in jeopardy" by his actions after a speech Wells had made to employees. Wells gave a copy of the letter to the employee to "follow along" with him as he read it to the group. Wells then asked the employee to sign it and return it so that Wells "could have it in the file in case there was a problem." The employee refused, and thus engaged in "direct insubordination" towards Board President Wells and General Manager Henderson, according to Wells.

b. *Factual analysis*

All of these conversations principally concern the same subject—the effect of a union victory upon employee jobs, particularly those of the right-of-way crewmembers; or the effect of a union defeat upon a possible improvement in status and pay. It is clear that both Doggett and Wells told employees that there was a motion before the board to reclassify the crew as groundmen or apprentice linemen, which would have constituted an improvement in their pay.

I credit Green's account of his conversation with Doggett. The assistant manager's testimony—denying that the Union was brought up in a first conversation with Green, but admitting that it was discussed during a second conversation—is less credible than Green's account because of Doggett's contradictory assertions concerning the time of the second conversation. Accordingly, I find that Doggett told Green that a motion had been made to move the right-of-way crew up to "line crew," but that this would not be done if the Union won the forthcoming election.

I also credit Green's account of his September 16 conversation with Wells in general, and accept Green's rather than Wells' version where they differ. The principal difference is whether Wells said that the fate of the right-of-way crew depended simply on the outcome of the election, as Green testified, or whether the chairman based it on additional possibilities such as poor economic conditions, which might require the Cooperative to "negotiate" (with the Union) to discontinue the right-of-way crew. I credit Green's specific denial that Wells said anything about the reason for eliminating the right-of-way crew. Wells' account, with its asserted contingencies and implication that Respondent would do nothing about the right-of-way crew without "negotiating" the matter with the Union, is highly artificial. Wells was hesitant in his testimony, and repeatedly asked for repetition of clear and unambiguous questions. Doggett and Wells said essentially the same thing to Green—the right-of-way crew would be "out the gate" if the Union won, and would be promoted if it lost.

Hall acknowledged on cross-examination that Wells said that the matter had to do with the financial situation. However, she insisted, this was all he said about the influence of money upon the loss of jobs if the Union won. I conclude that Wells' predictions to Hall were not dependent upon any contingency of poor economic conditions—if the Union won, one job "up front," one "in the back," and possibly the right-of-way jobs would be lost, "because of the financial situation." In addition to the artificiality of Wells' statements, it must be noted that both Green and Hall were employees of Respondent at the time of the hearing, a factor which adds reliability to their testimonies. *Gold Standard Enterprises, Inc.*, 234 NLRB 618 (1978).

H. *The Union Victory and the Discharge of Patrick*

As indicated above, the Union won the election, which was conducted on September 17. At a meeting 4 days later, on the evening of September 21, the Board voted to discharge Patrick pursuant to a motion by Board President Wells, because of Patrick's "possible conflict of interest." According to Wells, the discharge was caused by the fact that the board was considering 10 loan applications on September 21, and that Coastal Insulation had 9 out of the 10 contracts. The Board's minutes state: "Coastal Insulation's representative is Mark Patrick, Bill Patrick's brother. This created a possible conflict of interest and demonstrated unethical business practices for our Cooperative" (G.C. Exh. 3). Wells agreed that there was no proof of actual misconduct when the discharge decision was made. Wells instructed Henderson to give the information to Patrick. Accordingly, the general manager called Patrick early the next morning and told him not to come in to work, that Henderson would visit Patrick at his house. Henderson did so, and found Patrick's father together with the employee. The general manager told Patrick that the board had terminated him because of unethical and/or illegal business practices in connection with energy loans. According to Henderson, Patrick asked whether anyone had "stood up" for him, and Henderson merely replied that that was the last part of the meeting. Patrick testified that he asked Henderson whether he remembered Patrick's conversation with him prior to the time that Patrick's brother took the job with Coastal Insulation, and the general manager said that he did remember it. However, he did not relate this to anybody.

Henderson called Wells from Patrick's house, and asked him whether he and the Patricks could come over for a visit. According to Wells, he told Henderson that the general manager "had no business" coming to his house on the matter, but that the Patricks could come over.

I. *Patrick's Visits with the Trustees*

1. James B. Wells

On the 2 days following his discharge, September 22 and 23, Patrick and his father visited several of the trustees. As suggested by Henderson's call, they first saw Board President Wells. Patrick testified that Wells told him he had been fired because of illegal and unethical activities between his brother and Coastal Insulation. Patrick responded that he had talked to Henderson prior to his brother's taking the job, and that Henderson said it was all right. Wells, however, seemed upset because Coastal was getting all the work. According to Patrick, Wells asked him whether he had ever attended a union meeting, and Patrick replied that he went to the first one.

Patrick's father corroborated his son's testimony. When he and his son asked to be heard by the board, Wells replied that "there's really no way." After further discussion, Wells asked Patrick how many union meetings he had attended, and Patrick said "one." Patrick's father then told Wells that they should not hold it against his son because he attended a union meeting. "Yeah," replied Wells, "I know what went on at the union meeting. I even know how many people were there."

According to Wells, Patrick's father did most of the talking. The latter first asserted bias on Wells' part because Patrick's father, a member of the Cooperative, had kept Wells "off the nominating committee." The board president replied to the senior Patrick that that was "drawing for straws," and had nothing to do with the discharge. According to Wells, Patrick's father then said that his son had been fired because of his union activity. Wells replied that that was also "drawing for straws," and that he did not know whether Patrick had attended the union meeting. "As a matter of fact, since he's here, I'll ask him," Wells said, and did so, with Patrick's affirmative answer as already indicated. The Patricks asked Wells to call a special meeting of the board to consider the matter, but he refused to do so. Wells conceded that the Patricks told him about the prior discussion of the alleged conflict of interest with General Manager Henderson.

These accounts are essentially consistent, the only variation being Wells' assertion that he asked Patrick about the union meeting after the subject had first been raised by Patrick's father. I credit the consistent testimonies of both of the Patricks that it was Wells who first asked the question. His hostility to the union movement is established by the record, and his testimony was tailored to conceal this hostility.

2. Narvie Lee Golden

According to Patrick's testimony as corroborated by his father and another witness, Wesley Shell, Golden said that it "wasn't right" that Patrick had been fired, and that he, Golden, would sign a petition for a special meeting to consider the matter. Patrick told Golden, as he did each trustee, that he had consulted with Henderson about his brother's employment with Coastal Insulation. Golden did not testify.

3. John C. Diamond

According to the testimonies of the Patricks and Wesley Shell, Diamond stated that Patrick had a "legal problem" and needed a lawyer. The trustee said that he would support a special meeting of the board to reconsider Patrick's discharge. Diamond asked whether Patrick had attended a union meeting.

Diamond corroborated this evidence, and added that some of the conversation took place on the telephone immediately after the visit. Diamond acknowledged that he had been told that Patrick attended a union meeting, and, in somewhat garbled testimony, appeared to assert that Patrick asked him whether he had been fired because of this. Diamond contended that his own vote had not been affected by Patrick's presence at a union meeting, but admitted that he did ask Patrick during the visit whether he had attended the meeting.

4. Ralph Hayes

The Patricks then went to the Cooperative office and informed General Manager Henderson of what they were doing. They wanted to get a petition for a special meeting to take with them, but were informed that it could not leave the office. They met trustee Hayes near the office, and obtained his consent to sign a petition for a special meeting. This gave the Patricks what they believed to be the necessary support of three trustees for a special meeting.

5. Ernest Bartley

The Patricks visited Bartley, who told Patrick that the latter "had been done unlawful." Bartley promised to support a special meeting to consider the matter, according to the Patricks. Bartley did not testify.

6. W. M. Barrineau

Patrick and his father made their standard request for reconsideration of the discharge. Barrineau said that he was "wide open" about attending a special meeting, but could not do so the following Monday because of a prior commitment. Barrineau did not testify.

7. Preston Solomon

a. *Summary of the evidence*

Solomon's son was present during the Patricks' visit to the trustee. According to the Patricks, Solomon told them that he would attend a special meeting, but that it "wouldn't do any good." "This thing with your brother," he said, "that ain't nothing—that's just good business." What "got" Patrick was the fact that he attended the union meeting, plus the employees' "pushing" for the Union. Patrick had been "on thin ice" since the union movement started. The board had been wanting to fire Patrick since the annual meeting in April. (Patrick said he did not know what Solomon meant by this.) However, Patrick's attendance at the union meeting "did it."

Solomon added that "Jim Settles would be the first to go," and that the right-of-way crew would be "the next ones to go." The Cooperative would "go back to its contractor" to do this work. Solomon also said that he had told "Alan Robbins'" father that his son would be fired if he voted for the Union. Further, the board would "negotiate" with the Union, but would not "give them a contract." "They'll call it negotiating. We're just going to sit there and smile and talk, smile and talk . . . ."

Solomon acknowledged that he had a conversation with the Patricks subsequent to the discharge. He and his son were working in a farrowing house at the time. The conversation lasted about an hour, but Patrick's father did all the talking, while Patrick said nothing, not even "hello," not over "two or three words." Patrick's father said that his son had been unjustly treated, with Wells' playing a role in it because of something that had happened in the past, while Solomon denied that there had been any injustice. The senior Patrick also stated that the discharge was caused by his son's union activities. Solomon replied that Patrick had been on "thin ice" because he was never popular with the board. Neither of the Patricks asked him what he meant by this, according to Solomon.

This was essentially all that was said during the conversation, according to Solomon. Many things were said over and over. He denied saying that Patrick was fired because he attended a union meeting, and denied any mention of "Jim Settles" or the right-of-way crew.

b. *Factual analysis*

Solomon's account of this conversation is improbable. Thus, it is unlikely that Solomon and his son, then engaged in work, would have taken an hour to go over the few subjects mentioned by the trustee. The details of the conversation are so meager according to Solomon's version that it is unlikely the participants would have repeated them endlessly for so long a period of time. It is also unlikely that the Patricks would have failed to question Solomon about his assertion that the younger Patrick had been "on thin ice." Actually, this constitutes partial corroboration of the Patricks' testimonies on this subject, with Solomon leaving out the part about the Union; i.e., that Patrick had been on "thin ice" since the union movement started.

Solomon's testimony that the younger Patrick said almost nothing during the conversation is somewhat exaggerated, although other trustees made similar comments. It is true that the older Patrick was more gregarious and outgoing as he and his son appeared at the hearing. Although the younger Patrick is quieter, Solomon's description of the conversation would have him almost completely withdrawn, and this is not correct. A comparative analysis of the testimonies of the Patricks shows that each of them contributed to the conversation with Solomon, and the younger Patrick's performance on the job shows that he is able to communicate effectively. In any event, it is only natural that the son would let his father take the lead in discussions with the latter's peers and fellow members of the Cooperative.

The Patricks were the more credible witnesses, and I therefore accept their version of the conversation with Solomon.

8. James R. Lee

Lee was the last individual seen by the Patricks on September 22. He told them that he had conducted the board meeting at Wells' request when the discharge motion was made by Wells, but that he had not voted for it. According to the Patricks, he asked whether the younger Patrick had attended a union meeting, or asked how many he had attended. According to Patrick, his father discussed the union meeting, but the witness could not recall whether Lee or his father first raised the subject. Patrick's father, however, stated that it was Lee who did so.

Lee agreed that he met with the Patricks. His wife was just inside the house and overheard the conversation. She was also present in the courtroom during part of the hearing, according to Lee. The visitors asked Lee whether he would vote to reinstate Patrick and Lee refused to go against the "seven who voted against him." Lee denied that he asked Patrick whether he had attended a union meeting. Instead, he claimed that Patrick's father said that some of the trustees were upset because of Patrick's attendance. "I don't know anything about that," was Lee's reply according to his testimony. He also claimed that Patrick's father told him that Wells had "changed his mind" about the matter, a statement which Lee characterized as a lie.

It is improbable that the Patricks would have told Lee that Wells had changed his mind about Patrick's discharge. Wells' actual position was adamantly to the contrary, and the Patricks knew that Lee could easily have checked with Wells about the matter. The record contains no such false claims made by the Patricks to any other trustee, and there is no reason why they would have made, in Lee's case, an isolated and demonstrably false statement. Lee was an indecisive and unconvincing witness, while the Patricks were more forthright. Lee's wife overheard his conversation with the Patricks, according to Lee, and was in the courtroom during at least part of the hearing. Nonetheless, she was not called as a witness by Respondent, a factor which militates against Lee's credibility on the disputed factual issue of his conversation with the Patricks.[17] I credit the Patricks' version of the conversation.

9. Buddy Burkhead

The Patricks saw Burkhead on September 23. As in the other cases, they asked for a special meeting of the board and an opportunity to be heard. Burkhead replied, according to their testimonies, that there was not enough money in the Cooperative—or, according to Patrick's father, in the "REA"—to buy Patrick's trust, because he had attended the union meeting, and the "men in the back had pushed" for him to become a union member.

[17] See authorities cited in *Hadbar, Division of Pur O Sil, Inc.*, 211 NLRB 333, 337, fns. 3 and 4 (1974).

Burkhead testified that he did meet with the Patricks. He told them that he would attend a special meeting, but would not "undo what [he] had done." According to Burkhead, he informed the younger Patrick that the latter had "betrayed the trust of the Board by going to the union meeting." With respect to Coastal Insulation, Patrick's father said that things "looked bad," but that there was nothing "wrong" going on. Burkhead noted that someone else was originally supposed to have occupied Patrick's job, and that, in any event, the Cooperative did not need to have the position occupied.

As these versions are not inconsistent, and all witnesses were believable, I credit their composite accounts of the conversation.

J. *The Cooperative Investigates Patrick*

Wells stated that he was surprised at how "strong" the Patricks were toward him when they visited him, and, on the same or the following day, he asked trustees Diamond and Solomon to check into the 10 loan applications under consideration. Solomon was too busy to do so, but Diamond called two of the loan applicants.

Diamond testified that he called for the purpose of learning the reason that Coastal Insulation obtained most of the contracts. The first applicant was Margaret Dobson, a neighbor of Diamond. Her own son had given her a list of contractors with circles around three names, one of them being Coastal Insulation. Dobson was single, and lived alone. She had told Patrick, according to Diamond's testimony, that she did not want strangers in her house, and would feel more comfortable with someone that she knew. Diamond testified that Dobson knew both William Patrick and his brother, Mark. William Patrick affirmed that Dobson was worried because her sister's house had been burglarized, and asked Patrick to recommend somebody "she could trust." Patrick recommended Coastal Insulation, the only instance in which he made a recommendation.

The second loan applicant called by Diamond was an Ms. Penton. She reported to Diamond that her first estimate called for $1,500 in work, with repayment over 36 months. Instead, she got a $2,000 loan repayable over 60 months. On cross-examination, Diamond conceded that the additional interest caused by the longer term of the loan probably increased the amount. However, on redirect examination he contended that the initial loan without interest was $2,000, and that the total amount was in excess of $3,000. Penton also told Diamond that she received bids from other contractors, but still selected Coastal. She was nonetheless disturbed because she received "over 18 inches of insulation in her attic." On the other hand, Diamond said that he knew little about insulation, and had no way of knowing whether the work done in the Penton home was any different from the instructions on the computer printout supplied by the independent company which determined the work to be done.

These were the two cases reported to Board President Wells by Diamond. According to Wells, "both of them had some irregularities," and there would therefore be no need for Diamond to conduct any further investigation. The "irregularities" were reported to the board according to Wells, but he and Diamond did not "expand on it." There was some discussion, but no official action was taken by the board. The results of the investigation "strengthened the board's opinion," according to Wells. Despite their "irregularity," however, the board approved the Dobson and Penton applications.

K. *Testimony of Leon W. Shell*

Shell, a shareholder in the Cooperative and at one time a member of the nominating committee, testified that trustee Diamond came to his house about a week after Patrick's discharge for the purpose of enlisting his son's aid to get Patrick "to resign." This would be preferable to "having the record that the Cooperative fired him," as Diamond explained it to Shell. A few days later, Shell asked Diamond to reconsider the decision to fire Patrick. "No," answered Diamond, "he had attended a union meeting, and that wasn't pleasing to the Board."

Diamond confirmed that he had these conversations with Shell. He told Shell that he could not change his vote on Patrick's discharge because he had just talked with two of the loan applicants. He agreed that Patrick's attendance at a union meeting was discussed during his conversation with Shell, but denied saying that it had any influence on the board's decision. Instead, Diamond asserted, he told Shell that it did not affect his own decision.

Shell was a more credible witness than Diamond. The record is clear that Patrick's attendance at the union meeting was a subject of discussion among board members, and that some of them disliked the Union. Diamond's participation in the "investigation" of Patrick shows that he was more interested in justifying the board's action than he was in determining objective truth. There was nothing improper in Patrick's handling of the Dobson case, since she expressed a preference for "someone she knew," asked Patrick for a recommendation, and Coastal's name had been brought to her by her own son in the first place. The Penton matter shows even more clearly that Diamond created an "irregularity" out of a routine case. He relied entirely upon a telephone conversation with Penton, never saw a document in the case, and ended up simply guessing about the amount of the loan.

The sham nature of the investigation is further shown by Wells' and Diamond's failure to talk to the other eight loan applicants, and their failure to consult Patrick about the results of their investigation. It is also significant that Hayes' earlier and wider investigation resulted in a contrary conclusion.

Diamond's testimony was thus influenced by union animus, whereas Shell was a disinterested witness. I credit his version of the conversation with Diamond.

Shell testified that he also saw trustee Burkhead about the same time, and asked him to give Patrick "another chance." Burkhead mentioned Mark Patrick's job with Coastal Insulation as something the board did not like. Shell argued that William Patrick had not "done enough just to get fired." "Yeah," Burkhead answered, "he's also attended this union meeting the other night, and him

being a salaried employee. It's against our wishes for him to take part in the union meetings."

Burkhead confirmed Shell's testimony. Although he denied saying that Patrick was fired *because* he attended a union meeting, Burkhead stated that he told Shell that Patrick's attendance of the union meeting "hadn't helped things at the Co-op a bit." The trustee asserted that he asked Shell the "pointed question" of whether *he* wanted a union at the Cooperative and that Shell replied in the negative. Anyway, Burkhead contended, the Cooperative did not need the position filled.

Shell also talked with trustees Golden and Hayes, who told him that Patrick had been "mistreated." Hayes stated at the hearing that Patrick had been discharged because of his union activity.

L. *The Board's Refusal To Reinstate Patrick*

Hayes testified that only three of the trustees showed up at a special meeting to consider Patrick's discharge. Wells claimed that the other trustees were too busy to attend. The Cooperative's bylaws state that a quorum consists of a majority of the nine trustees; i.e., five, in order that the action of such trustees be considered an act of the board (G.C. Exh. 6, art. V, sec. 4). Accordingly, the special meeting accomplished nothing.

The next regular board meeting was "pretty hot," according to Hayes. Wells stated to the trustees that he had appointed a committee to investigate Patrick. Hayes challenged this on the ground that it had been done outside a regular board meeting. Wells' answer was, "Well, it's been done, you know." Hayes then asked the president whether his action conformed with "the sunshine law," and Wells replied that he did not want it to come under "the sunshine law." The Patricks were present, and a motion to rehear the case was defeated, although the senior Patrick was allowed to make some brief comments.

M. *Legal analysis*

1. The Cooperative's responsibility for the actions of its trustees

As noted above, the Cooperative denies that its trustees are its agents. Although Respondent's bylaws identify its governing authority as a "Board of Trustees," the bylaws confer upon the trustees, and the corporate officers whom they elect, powers normally associated with those of a board of directors and officers of a typical corporation. Indeed, Board President Wells occasionally refers to the Cooperative's governing body as a "Board of Directors." The National Labor Relations Board has concluded with judicial approval that a member of a corporate board of directors was an agent of the corporation, in light of the control exercised by the board and the limited number of directors. *Fort Vancouver Plywood Company*, 235 NLRB 635, 637, fn. 1 (1978), enfd. as modified 604 F.2d 596 (9th Cir. 1979).[18] In the instant case, the trustees have complete control over management of the corporation. Although Henderson has the formal title of "General Manager," it is the board of trustees that runs the business. Its control extends to labor relations, a factor which the National Labor Relations Board has considered significant in attributing the conduct of a director to the corporation in another case. *Eastman Cotton Mills*, 90 NLRB 31 (1950). Also, as in *Fort Vancouver Plywood*, the number of trustees in this case is limited. Accordingly, I conclude that each of Respondent's trustees is an agent of the Cooperative within the meaning of Section 2(13) of the Act.

2. The alleged unlawful threats and promises

As set forth above, trustee Diamond and Assistant Manager Doggett told employees that members of the right-of-way crew would be discharged if the Union won a forthcoming election. It is well established that such threats of reprisal for engaging in protected activity are violative of Section 8(a)(1), and I find that, by engaging in such conduct, Respondent has violated the Act herein.

The Cooperative relies on Wells' testimony that he merely told Hall and Green that the Cooperative might have to "negotiate out" the right-of-way crew if the Union put the Cooperative "in an economic condition where it could not continue to work." Respondent argues that this was merely a discussion of "the possible economic consequences if the Cooperative negotiated with the Union."

My findings as to these conversations, and my reasons for rejecting Wells' versions of them, are set forth above. However, even if his version were to be credited, his remarks would still have been violative of the Act. An employer may "make a prediction as to the precise effects he believes unionization will have on his company. In such a case, however, the prediction must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control . . . . If there is any implication that an employer may or may not take action solely on his own initiative for reasons unrelated to economic necessities and known only to him, the statement is no longer a reasonable prediction based on available facts but a threat of retaliation based on misrepresentation and coercion . . . ." *N.L.R.B.* v. *Gissel Packing Co., Inc., et al.*, 395 U.S. 575, 618 (1969).

In a case where the employer said in a letter to employees that a union contract would result in increased costs and loss of flexibility requiring operational changes which "could mean the closing of our operation," the Court of Appeals for the Eighth Circuit agreed with the Board that this "fairly innocuous" statement, interpreted in context with other employer statements, "can be construed as echoing a hard line threat . . . ." *Nebraska Bulk Transport Inc.* v. *N.L.R.B.*, 608 F.2d 311 (8th Cir. 1979), enfg. as modified 240 NLRB 135 (1979). In this case, Wells' version of his statements to Green and Hall must be interpreted in context with the umambiguous threats on the same subject made by trustee Diamond and Assistant Manager Doggett. In these circumstances,

[18] See also *Mount Hope Finishing Company, et al.*, 106 NLRB 480, 498 (1953), reversed on other grounds 211 F.2d 365 (4th Cir. 1954); *Caroline Mills, Inc.*, 64 NLRB 376 (1945), reversed on other grounds 158 F.2d 793 (5th Cir. 1946).

Wells' statements, even as asserted by him, "can be construed as echoing a hard line threat" (*id.*), and were also violative of the Act. Further, even if Wells did tell Hall that he was not making any promises or threats, this was merely an ineffective attempt at camouflage, which did not conceal the coercive effect of Wells' statements.

Doggett also told Green that a motion had been made to move the right-of-way crew "up to line crew," which would have resulted in a pay raise according to Green. On the other hand, the crew would remain where it "was at" if the Union won the election. This is clearly a promise of economic benefit in return for voting against the Union, and is also violative of Section 8(a)(1) under established law. In addition, Wells told Green that the crew would be "moved up" if the Union lost, and handed him a copy of Henderson's motion to this effect.

The complaint alleges a somewhat different promise in return for employee rejection of the Union—employees would be given less arduous work. However, the nature of the promised reward was thoroughly litigated at the hearing, and a finding that it violated the Act, although not precisely as stated in the complaint, is warranted under established law.

As noted above, Wells asserted that he told Green that he was talking to him as "a friend" and not as "a Director," and that he told Hall that he was speaking with her on "an individual basis," and was "not representing the Board."

However, Wells also testified that the trustees were "disappointed" that the employees were considering "a third party" to represent them. He addressed employees about the Union in a speech on September 16, the day before the election, and the same day that he spoke to Green and Hall. According to Wells, he told Hall that another employee had engaged in "direct insubordination" towards Wells by refusing to sign and return a copy of a letter which Wells was utilizing in his speech to employees. By so doing, Wells told Hall, this employee had "almost put his job in jeopardy." The conversations which Wells had with Green and Hall took place in General Manager Henderson's office after Wells' speech to employees.

In these circumstances, any claim by Wells that he was speaking only as an "individual" or a "friend" would not prevent his statements from being attributed to Respondent. The inherently coercive nature of those statements to Green and Hall was not dispelled by Wells' attempted disclaimer of his status as president of Respondent's board of trustees. The place of the conversations, in the general manager's office, their timing, immediately after Wells' speech to employees, and the reference to another employee's "insubordination" show that Wells was talking to Hall and Green as a superior to subordinates, on behalf of the board. There is no record evidence of any personal friendship between Wells and Green or Hall, and I reject his attempt to avoid corporate responsibility by this evasive shuttle between official and personal status.

Respondent argues that these statements by Respondent's agents did not constitute coercive "interrogation," citing recent authority.[19] This argument is beside the point. The statements constituted unlawful threats of reprisal and promises of benefit, not interrogation.

3. The alleged violations pertaining to Patrick

a. *Respondent's contention that Patrick was a managerial employee*

Respondent argues that Patrick was a managerial employee and was therefore excluded from the protection of the Act. The General Counsel argues that Patrick's status has already been litigated in the representation proceeding, and that Respondent is attempting impermissible relitigation of the same issue.

The General Counsel's position is incorrect. Section 102.67(f) of the Board's Rules and Regulations provides that failure to request review of the Regional Director's decision, as was the case herein, shall preclude relitigation, in any "related" subsequent unfair labor practice proceeding, of any issue which was or could have been raised in the representation proceeding. However, the Board's current position is that a "related" proceeding is one where the issue comes up, for example, in an 8(a)(5) case based on a certification of a representative, but does not include a case where independent violations of Section 8(a)(1) are alleged. *Serv-U-Stores, Inc.*, 234 NLRB 1143 (1978). Accordingly, I conclude that the issue of whether Patrick was a managerial employee is properly before me.

Respondent's argument that Patrick was a managerial employee is principally grounded on a difference of opinion between the Board and the Court of Appeals for the Eighth Circuit with respect to a case involving an employee of another electric cooperative, and on the Supreme Court's redefinition of managerial employees in later cases.

In *North Arkansas Electric Cooperative, Inc.*, 168 NLRB 921 (1967), the employee in question, "Electrification Advisor" Jack Lenox, had duties similar to those of Patrick in the instant case. The Trial Examiner therein summarizes case law at the time, and the development of two criteria for determining managerial employee status: (1) whether a determination that the individual was a rank-and-file employee would present the employer with a potential conflict of interest between the employer and the workers, or, summarily, whether the individual was "closely aligned" with management; and (2) whether the individual formulated, determined, and effectuated employer policies, and exercised discretion outside the limits of established employer policy. Concluding that Lenox did not meet either test, the Trial Examiner held that he was an employee within the meaning of the Act, and the Board affirmed.

The Court of Appeals for the Eighth Circuit disagreed as follows:

[19] *TRW, Incorporated* v. *N.L.R.B.*, 654 F.2d 307 (5th Cir. 1981), dening enforcement of 245 NLRB 1158 (1979); *Dow Chemical Company, Texas Division* v. *N.L.R.B.*, 660 F.2d 637 (5th Cir. 1981), denied enforcement 250 NLRB 748 (1980); *IML Freight, Inc.*, 249 NLRB 861 (1980).

> In summary, we believe that the record amply demonstrates that Lenox exercised discretion in the performance of his duties and that the nature of his responsibilities were such as to closely ally him with management.
>
> We are also convinced, from a review of the decided cases, that had this issue been presented to the Board in the context of a representation election that the Board would have excluded Lenox as a "managerial employee" . . . . It cannot, irrespective of the illegality or unfairness of the discharge, be permitted to reach a different result because the question is presented in the context of an unfair labor practice.

Accordingly, the court reversed and remanded the case to the Board with instructions to determine whether the discharge of Lenox, "as a 'managerial employee,'" was violative of the Act. *N.L.R.B.* v. *North Arkansas Electric Cooperative, Inc.*, 412 F.2d 324, 328 (8th Cir. 1969).

On remand, the Board noted its "lack of clear definition" of managerial employees, and "the difficult process . . . in evaluating 'community of interest' in many kinds of unit determinations." The Board continued:

> Since, however, in representation cases "community of interest" is the principal determinant, our decisions in those cases are not genuinely relevant to the issue here. An employee may not have the requisite community of interest with other employees to be included with them in a proposed unit, and yet clearly be an employee entitled to the protection of the Act as a Section 2(3) "employee."

The Board then concluded that Lenox did not exercise discretion "with respect to employee relations matters" and that he was therefore an employee within the meaning of the Act. *North Arkansas Electric Cooperative, Inc.*, 185 NLRB 550 (1970). In denying enforcement, the court stated that the Board's rationale ignored the court's prior ruling that Lenox assisted in conducting training classes, and improperly limited the class of employees not protected by the Act. With respect to the Board's discussion of "community of interest" in unfair labor practice cases, the court stated:

> We find nothing in the Act or its legislative history to indicate Congress intended the word "employee" to have one definition for the purpose of determining a proper bargaining unit and another definition for the purpose of determining which employees are protected from being fired for union activity. *N.L.R.B.* v. *North Arkansas Electric Cooperative, Inc.*, 446 F.2d 602, 609-610 (8th Cir. 1971).

Prior to the court's second decision in *North Arkansas*, the Board issued its decision in *Bell Aerospace Company, Division of Textron, Inc.*, 190 NLRB 431 (1971), a representation case. Relying upon *North Arkansas*, the Board concluded that "'managerial employees' are employees within the meaning of the Act and entitled to its protection." The Board concluded that representation of the employer's buyers would not create a conflict of interest, and included them in the bargaining unit. After issuance of the court's decision in *North Arkansas*, the employer in *Bell Aerospace* filed a motion for reconsideration, and the Board reaffirmed its prior holding:

> [T]hroughout any attempted analysis must run the common thread of an examination as to whether the duties and responsibilities of any managerial employee or group of managerial employees do or do not include determinations which should be made free of any conflict of interest which could arise if the person involved was a participating member of a labor organization. That is the fundamental touchstone.
>
> If we find, upon the facts of any case, that the probabilities of such conflict are sufficiently minimal, then in the absence of congressional mandate we would see no commonsense reason to deny such persons the opportunity to freely engage in concerted activity and the right to decide for themselves whether or not they wish to be represented in their dealings with their employer by a labor organization. *Bell Aerospace Company, Division of Textron, Inc.*, 196 NLRB 827 (1972).

The employer in *Bell Aerospace* thereafter tested the certification in an 8(a)(5) proceeding, and the Board held that the company's refusal to bargain violated the Act. *Bell Aerospace, a Division of Textron, Inc.*, 197 NLRB 209 (1972). The Court of Appeals for the Second Circuit denied enforcement, in part on the ground that it was unclear whether the Board's decision rested upon a factual determination or upon its "erroneous" conclusion that all managerial employees were "employees" within the meaning of the Act, unless such determination would create a conflict of interest between the employer and his employees. *Bell Aerospace Company, Division of Textron, Inc.* v. *N.L.R.B.*, 475 F.2d 485 (2d Cir. 1973). This in turn led to the Supreme Court case upon which Respondent principally relies.[20] The Court sustained the Second Circuit's opinion as follows:

> In sum, the Board's early decisions, the purpose and legislative history of the Taft-Hartley Act of 1947, the Board's subsequent and consistent construction of the Act for more than two decades, and the decisions of the courts of appeals, all point unmistakably to the conclusion that "managerial employees" are not covered by the Act. We agree with the Court of Appeals below that the Board "is not now free" to read a new and more restrictive meaning into the Act. *N.L.R.B.* v. *Bell Aerospace Company, Division of Textron, Inc.*, 416 U.S. 267, 289 (1974).

The Court also noted that "[t]he Board's exclusion of 'managerial employees' defined as those who 'formulate and effectuate management policies by expressing and making operative the decisions of their employer,' has

[20] Respondent also cites *N.L.R.B.* v. *Yeshiva University*, 444 U.S. 672 (1980).

also been approved by courts without exception" (*id.*). The Court expressed no opinion as to whether the employees in question were "managerial employees," and remanded the case to the Board for such determination.

Respondent also cites various similarities between Patrick's job in this case, and that of Lenox in *North Arkansas, supra*. The Board has had occasion to pass on such job characteristics in other cases. Patrick's principal function was to make energy audits. However, he merely reported the energy conservation characteristics of the house, and an independent company, with the use of a computer, determined the improvements to be made. This is similar to the work of a service coordinator who inspected homes for defects upon a customer's complaint, *L & S Enterprises, Inc.*, 245 NLRB 1123, 1126 (1979), and, in its perfunctory quality, to that of weighmaster who routinely arranged coal-sample testing and reported the results to the employer, *Maidsville Coal Co., Inc.*, 257 NLRB 1106 (1981)—neither of which functions warranted a determination that the employee was managerial in nature.

Although Patrick had an office, represented his employer to the public, and attended staff meetings, similar attributes of another job, including the making of policy recommendations, were not considered sufficient to warrant a conclusion that the employee was managerial. *District #1, Pacific Coast District, Marine Engineers Beneficial Association*, 259 NLRB 1258 (1982). The fact that Patrick was salaried was not determinative, *Gordon L. Rayner and Frank H. Clark, d/b/a Bay Area Sealers*, 251 NLRB 89 (1980), nor was his title of "Energy Adviser" or "Director of Member Services," *J. J. Newberry Co., a Wholly Owned subsidiary of McCrory Corporation*, 249 NLRB 991 (1980), enfd. as modified 645 F.2d 148 (2d Cir. 1981). Although Patrick arranged for safety programs for crewmembers, this was insufficient to warrant managerial status, as the Board found with respect to registered nurse staff development instructors who actually prepared and delivered instructional programs. *Milwaukee Children's Hospital Association*, 255 NLRB 1009, 1013 (1981).

In sum, Patrick had no discretion independent of the Cooperative's established policies, and therefore was not a managerial employee. *Alco-Gravure, Inc.*, 249 NLRB 1019 (1980); *Simplex Industries, Inc.*, 234 NLRB 111 (1979). This conclusion is consistent with the Supreme Court's decision in *Bell Aerospace, supra.*

b. *Respondent's contention that Patrick was not an "employee" because he was discharged—the threat not to sign a contract with the Union*

The complaint alleges that Respondent, by its agent Preston Solomon, told an employee that Respondent would never give the Union a contract. As described above, Solomon told the Charging Party and his father, on September 22, that the Cooperative would "negotiate" with the Union, but would not give it a contract. "They'll call it negotiating. We're just going to sit there and smile and talk, smile and talk . . . ."

Respondent argues that, since the Charging Party had already been discharged at the time these statements were made, he was "neither an employee of the Cooperative nor a person protected by the Act." Respondent further argues that the Cooperative is governed by a nine-member Board, which can only "take actions as a body." Solomon had "no individual authority," and his statement was "not binding upon the Cooperative."

Respondent's assertion to the contrary notwithstanding, Patrick, although recently discharged, was an "employee" within the meaning of Section 2(3) of the Act, and was entitled to its protection. *Clark & Hinojosa, Attorneys at Law, a Professional Corporation*, 247 NLRB 710, 715–716 (1980). As for Respondent's second argument, the Cooperative's responsibility for Solomon's statements has already been described above. *Fort Vancouver Plywood Company; Eastman Cotton Mills, supra.* In those cases, a company director's acts of interference with employee rights, similar to those engaged in by Solomon, were attributed to the employer. It is established law that an employer's statement to employees that he will not negotiate with their collective-bargaining representative, or will not enter into a contract with it, creates an impression that the employees' union activities are futile, and therefore interferes with their statutory rights. Accordingly, I conclude that Respondent, by trustee Solomon's statements described above, thereby violated Section 8(a)(1) of the Act.

c. *The alleged unlawful interrogation*

The complaint also alleges various instances of unlawful interrogation concerning employees' union activities. As shown above, various trustees asked Patrick whether he had attended a union meeting. Although Respondent contends that the trustees were merely responding to statements about the Union initiated by Patrick's father, the credited evidence does not support this factual assumption.

Respondent argues that such questions, even if asked, were not coercive, citing principally decisions by the Court of Appeals for the Fifth Circuit. *TRW Incorporated* v. *N.L.R.B.; Dow Chemical Company, etc.* v. *N.L.R.B., supra.* In *TRW*, the court stated:

> To determine whether an interrogation tends to be coercive, we examine: (1) the history of the employer's attitude toward its employees; (2) the type of information sought or related; (3) the company rank of the questioner; (4) the place and manner of the conversation; (5) the truthfulness of the employee's responses; (6) whether the employer had a valid purpose in obtaining the information; (7) if so, whether this purpose was communicated to the employee; and (8) whether the employer assures employees that no reprisals will be taken if they support the union.

Citing its decision in another case, the court added:

> [A] proper evaluation of the evidence goes beyond examining a list of factors and then comparing the number that favor the employer to the number that favor the union.

The court continued in *TRW* as follows:

> Thus, while these criteria must be applied in each case, a determination of whether the interrogation tends to be coercive rests on a consideration of the eight factors in light of the total circumstances of the case. *Id.* at 314.

The Board in recent cases had rejected the view that interrogation must be accompanied by threats of reprisal or promises of benefits to be coercive. Rather, the Board has concluded, the test is whether the questioning "conveys an employer's displeasure with employees' union activity and thereby discourages such activity in the future." *Gossen Company, a Division of the United States Gypsum Company*, 254 NLRB 339 (1981).[21]

With specific reference to questioning about employee attendance of union meetings, the Board has recently held such interrogation to be unlawful.[22] In *Cagles, Inc.*, 234 NLRB 1148 (1978), enfd. as modified 588 F.2d 943 (5th Cir. 1979), the Board concluded that the employer violated Section 8(a)(5), and that he also violated Section 8(a)(1) by conduct including interrogation concerning attendance of union meetings. The Board's Order, *inter alia*, directed the employer to cease and desist from interrogating employees concerning their union activities. The Court of Appeals for the Fifth Circuit agreed that "[c]ircumstances surrounding employer interrogation of an employee's union sympathies are determinative of the questions' tendency to coerce." *Id.* at 948, fn. 3. Although the court believed that the interrogation in that case lacked "sufficient independent value to contribute to a finding of bad-faith bargaining" (*id.*), it did enforce the portion of the Board's Order requiring the employer to cease and desist from engaging in unlawful interrogation.

I am bound by Board law, and, taking into consideration both the general rationale in *Gossen, supra*, and the Board's specific holdings in the union attendance cases cited above, I conclude that Respondent, by its trustees' asking Patrick whether he had attended a union meeting, thereby violated Section 8(a)(1). Patrick did not have to *infer* that the questions conveyed the Cooperative's displeasure with his attendance of the meeting—some of the trustees said it explicitly.

Were I to decide the case utilizing the factors set forth by the Fifth Circuit Court of Appeals, I would not arrive at a different conclusion. As there is no prior history of unfair labor practices, the first factor favors the Cooperative. Factor 2 favors the Charging Party, since inquiries concerning attendance of union meetings may lead to employer knowledge of union sympathies, and this knowledge to discrimination. Factor 3 favors Patrick, because the questioners were the Employer's highest ranking officials. The fourth factor also favors the Charging Party—Patrick was trying to get his job back, and the trustees wanted to know whether he had attended a union meeting.

Considering the fifth factor, Patrick's answers to the trustees' questions were truthful. Normally this might be deemed a factor favorable to the employer, since it tended to show that the employee considered the question to be innocuous. However, in this case, Patrick had already been discharged, and this normal inference is therefore not warranted. Prior to the discharge, when Henderson asked Patrick the same question, the latter's answer was untruthful.[23]

All the remaining factors favor Patrick. The Cooperative had no valid purpose in knowing whether he had attended a union meeting, did not convey any such nonexistent purpose to employees, and threatened them with reprisals for engaging in union activity, rather than assuring them that there would be no reprisals.

d. *The alleged discrimination*

The complaint also alleges that Patrick was discharged because of his union activities, in violation of Section 8(a)(3) and (1). The General Counsel has set forth a strong *prima facia* case in support of this allegation. Thus, Patrick attended a union meeting in July, a fact which became known to several of the trustees, including Board President Wells. The union animus of most of the Board's trustees, and of Assistant Manager Doggett, is well established by the record. Some of them were quite explicit about their opposition to the Union. The fact that Patrick's discharge was linked to the union movement is shown by the trustees' persistent questioning of him about the union meeting, and by the candid disclosures of trustees Solomon, Diamond, and Burkhead—Patrick had been "on thin ice" since the union movement started, and his attendance of the union meeting "did it"; this action by Patrick "wasn't pleasing to the Board"; and he had "betrayed the trust of the Board by going to the union meeting." Trustee Hayes put the matter bluntly at the hearing—Patrick was discharged because of his union activity.

Respondent's contention that Patrick was discharged because of his brother's job with Coastal Insulation, leading to "a possible conflict of interest" and "unethical business practices," is an obvious pretext. Patrick discussed his brother's employment with Henderson about the time that it started, and the business manager put his blessing on it. Mark was a "local boy," and it would be "an asset." Indeed, Henderson contradicted Respondent's defense by denying that there was any "problem" with

[21] See also *PPG Industries, Inc., Lexington Plant, Fiber Glass Division*, 251 NLRB 1146 (1980).

[22] *Catalina Yachts*, 250 NLRB 283, 287 (1980); *Endo Laboratories, Inc.*, 239 NLRB 1074, 1076 (1978).

[23] Counsel for the General Counsel argues that a finding should be made that General Manager Henderson's asking Patrick whether he attend a union meeting was also violative of Sec. 8(a)(1)—despite the fact that it was not alleged in the complaint—on the ground that it was "fully litigated." Henderson was called first as a witness for the General Counsel, who did not ask him any questions about such interrogation. The matter was raised for the first time in Patrick's testimony on March 24, 1982, more than 6 months after Henderson's interrogation about July 1981. Henderson was present throughout the hearing, was called again as a witness by Respondent, and was questioned by Respondent's counsel and by counsel for the General Counsel. However, neither counsel asked him about the interrogation of Patrick, and counsel for the General Counsel did not move to amend the complaint to add such interrogation as an additional violation. Under these circumstances, I am not persuaded that the matter has been "fully litigated," or that Respondent has been put on notice. *Andres Oldsmobile, Inc.*, 230 NLRB 1191 (1977). Any such proposed finding would merely be cumulative, and would not change the nature of a remedial order. Accordingly, I find it unnecessary to pass on the General Counsel's argument. *Queen City Equipment Corporation*, 211 NLRB 284, fn. 1 (1974).

this arrangement up to the time Patrick was discharged. The record shows that Coastal Insulation did not increase its already dominant share of the conservation business after its employment of Mark Patrick, and trustee Hayes' mid-summer investigation showed no improprieties.

Although trustee Solomon said he "would not be a party to it" after the loan committee discovered Mark's employment, and although Solomon brought the matter to Wells' attention, the board took no action at that time. It was only after the Union's victory in the September election that the Cooperative, being then aware of Patrick's attendance of a union meeting, decided that he was guilty of a "possible" conflict of interest and "unethical" business practices, allegations which were never proved. The fictitious nature of Respondent's defense is more fully disclosed by the sham investigation conducted by Wells and Diamond, described above, and by its refusal to allow Patrick a hearing on the matter.

I therefore conclude that Respondent has not rebutted the General Counsel's *prima facie* case, and that Respondent, by its discharge of Patrick because of his union activities, thereby violated Section 8(a)(3) and (1) of the Act.

In accordance with my findings above, I make the following:

CONCLUSIONS OF LAW

1. Escambia River Electric Cooperative, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. Local Union No. 2152, International Brotherhood of Electrical Workers, is a labor organization within the meaning of Section 2(5) of the Act.
3. By engaging in the following conduct, Respondent committed unfair labor practices in violation of Section 8(a)(1) of the Act:

(a) Threatening employees with loss of jobs if they selected the Union as their collective-bargaining representative.

(b) Promising employees increased pay if they failed to select the Union as their collective-bargaining representative.

(c) Telling employees that it would not sign a contract with the Union.

(d) Coercively interrogating an employee concerning his union activities.

4. By discharging William E. Patrick, Jr., on September 22, 1981, because of his union activities, Respondent thereby violated Section 8(a)(3) and (1) of the Act.
5. The foregoing unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.
6. Respondent has not violated the Act except as specified herein.

THE REMEDY

It having been found that Respondent has engaged in certain unfair labor practices, it is recommended that it be ordered to cease and desist therefrom and take certain affirmative action designed to effectuate the purposes of the Act.

It having been found that Respondent unlawfully discharged William E. Patrick, Jr., on September 22, 1981, it is recommended that Respondent be ordered to offer him immediate and full reinstatement to his former position or, if such position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges, dismissing if necessary any employee hired to fill said position, and to make him whole for any loss of earnings he may have suffered by reason of Respondent's unlawful conduct, by paying him a sum of money equal to the amount he would have earned from the date of his unlawful discharge to the date of an offer of reinstatement, less net earnings during such period, with interest thereon, to be computed on a quarterly basis in the manner established by the Board in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977).[24]

I shall also recommend that Respondent be required to post appropriate notices.

Upon the foregoing findings of fact, conclusions of law, and the entire record, I recommend the following:

ORDER[25]

The Respondent Escambia River Electric Cooperative, Inc., Jay, Florida, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Threatening employees with loss of jobs if they select Local Union No. 2152, International Brotherhood of Electrical Workers, or any other labor organization, as their collective-bargaining representative.

(b) Promising employees increased pay if they fail to select the above-named union, or any other labor organization, as their collective-bargaining representative.

(c) Interrogating employees concerning their union activities.

(d) Discouraging membership in Local Union No. 2152, International Brotherhood of Electrical Workers, or any other labor organization, by discharging employees because of their union activities, or by discriminating against them in any other manner with respect to their hire, tenure, or any term or condition of employment.

(e) In any other like or related manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the purposes and policies of the Act:

(a) Offer William E. Patrick, Jr., immediate and full reinstatement to his former position or, if such position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges, discharging if necessary any employee hired to replace him, and make him whole for any loss of earnings he may have suffered by reason of Respondent's dis-

[24] See, generally, *Isis Plumbing & Heating Company*, 138 NLRB 716 (1962).

[25] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

crimination against him, in the manner described in the section of this Decision entitled "The Remedy."

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this recommend Order.

(c) Post at its facilities in Jay, Florida, copies of the attached notice marked "Appendix."[26] Copies of said notice, on forms provided by the Regional Director for Region 15, after being duly signed by its representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 15, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that the complaint be dismissed insofar as it alleges violations of the Act not specifically found herein.

[26] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."